No. 80-441

In the Supreme Court of the United States

October Term, 1980

GULF OIL COMPANY, et al.,
Petitioners,

vs.

WESLEY P. BERNARD, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF TALLAHASSEE MEMORIAL HOSPITAL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TALLAHASSEE MEMORIAL HOSPITAL, by and through its undersigned counsel, files this brief as amicus curiae in support of the Petitioners

STATEMENT OF INTEREST

Tallahassee Memorial Hospital (hereinafter "TMH") is the defendant in *Lilla Ann Norton, et al. v. Tallahassee Memorial Hospital,* TCA No. 76-163, currently pending before the United States District Court for the Northern District of Florida, Tallahassee Division. The *Norton* action was filed on September 22, 1976, as a Rule 23(b)(2) class action, seeking back pay, injunctive relief, costs and

attorney's fees under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

During most of the more than four year period that the *Norton* lawsuit has been pending before the district court, it has been governed by a local rule and various orders of the district court relating to communications between the parties, their attorneys, and actual or potential class members. Said local rule and orders of the district court have been similar to the class communications order entered by the district court in the case at bar.

Notwithstanding the local rule and orders of the district court governing class communications, counsel for the parties to the *Norton* action have effectively communicated with hundreds of the purported class members for the purpose of obtaining information and discovery relating to the lawsuit. Reports and other documents filed with the district court indicate that Norton's counsel have, since the filing of the lawsuit and the application of the local rule governing class communications thereto, communicated with many of the purported class members by letter and telephone, conducted a number of meetings with many of the purported class members, and "spent very substantial periods of time"—"an astronomical number of attorney hours"—personally interviewing and conferring with most of the purported class. Similarly, counsel for TMH have spent hundreds of hours during the last several years interviewing most of the purported class members in accordance with the district court's local rule and orders governing class communications. Class discovery has been completed, and the parties are awaiting a hearing on Norton's motion for class certification.

At no time since the filing of the *Norton* lawsuit and the application of the local rule governing class communications thereto has any allegation or evidence been pre-

sented to the district court to show that the parties or their attorneys have in any way been impeded or impaired in preparing their case for trial by the district court's local rule or orders governing class communications.

Because of the substantial amount of time, effort, and money which TMH has expended in communicating with purported class members in accordance with the district court's local rule and orders and otherwise preparing its case for trial, TMH has a direct and immediate interest in the integrity and legitimacy of the activities which have occurred to date in the *Norton* lawsuit and in the local rule and orders relating to class communications which have governed said activities.

SUMMARY OF ARGUMENT

In Part V of its *en banc* decision, the Fifth Circuit erroneously concluded that the communications at issue herein are constitutionally protected. The Fifth Circuit found no distinction between the communications proscribed by the district court's order in the instant case and the communications involved in two earlier decisions of this Court, *NAACP v. Button,* 371 U.S. 415 (1963), and *In re Primus,* 436 U.S. 412 (1978). At the same time, the Fifth Circuit found inapposite the constitutionally unprotected communications involved in this Court's decision in *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978).

Neither *Button* nor *Primus* involved litigation brought under a statute which expressly authorizes an award of attorneys' fees to the prevailing party. Instead, both *Button* and *Primus* arose before Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

In contrast, the instant litigation includes claims for attorney's fees under both Title VII and 42 U.S.C. § 1988. Because the potential recovery of attorney's fees in a Title VII class action depends in part upon the size of the class for which relief is obtained, parties-plaintiff and their attorneys stand to benefit financially from communications with actual or potential class members. This prospect of financial gain to Title VII plaintiffs and their attorneys, and the availability of substantial back pay awards to prevailing Title VII class members, create the possibility that *any* communications between the parties or their attorneys and actual or potential class members may involve misrepresentation or overreaching. The possibility of misrepresentation is further increased in the Title VII area because class members often tend to be uneducated and unschooled in the technicalities of the law. In many cases, the only means of effectively communicating with such unlettered class members is in person, which further enhances the possibility of misrepresentation, overreaching, or undue influence. However laudatory, unselfish and public-interest oriented the motives of Plaintiffs' attorneys may be in the case at bar, the prospect of financial gain to the Plaintiffs and their attorneys and the related possibility of misrepresentation to absent class members take the communications at issue herein outside the protective scope of the First Amendment.

ARGUMENT

In Title VII Class Litigation Involving a Claim for Attorney's Fees, Communications Between Parties or Their Attorneys and Actual or Potential Class Members Do Not Enjoy Constitutional Protection.

In Part V of its *en banc* decision, the Fifth Circuit, citing this Court's earlier decisions in *NAACP v. Button, supra,* and *In re Primus, supra,* held that the communications proscribed by the district court's order are constitutionally protected. The Fifth Circuit based its holding on the fact that the subject matter of the communciations at issue is the same as the subject matter of the communications involved in *Button* and *Primus*—i.e., racial discrimination. Because the subject matter of the solicitation activities of Plaintiffs' attorneys in the case at bar related to the vindication of allegedly illegal racial discrimination, the Fifth Circuit found no difference between the class communication activities of Plaintiffs' attorneys in the instant case and the solicitation activities of the attorneys in *Button* and *Primus.*

Not all speech involving a particular subject matter enjoys the privileges and protection of the free speech provisions of the First Amendment. In fact, the question of constitutional protection does not turn, as the Fifth Circuit suggests, upon the subject matter of the communication, but instead depends upon the nature or form of the speech and the context in which it is made. As Justice Holmes noted in *Schenck v. United States,* 249 U.S. 47, 52 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre."

Similarly, neither the parties to pending litigation nor their attorneys enjoy unbridled constitutional protection

of all of their speech. Whether the speech of litigants or attorneys falls within the protective umbrella of the First Amendment depends, once again, upon the form or nature of the speech and the context in which it is presented.

With respect to the speech of attorneys, champerty, barratry, and maintenance were recognized offenses under the common law long before the passage of the Bill of Rights. Winfield, *The History of Conspiracy and Abuse of Legal Procedure,* 152 (1921). The common law offense of champerty involved an attorney's soliciting or maintaining a lawsuit in return for a financial interest in the outcome. 4 W. Blackstone, *Commentaries* 134-136. Barratry and maintenance similarly involved actions motivated by the prospect of personal pecuniary gain. *Id.*

There is nothing in the recorded history of the Bill of Rights to indicate that either its authors or the state legislatures which adopted it intended the free speech provisions contained therein to encroach upon or abolish the common law offenses of champerty, barratry, or maintenance. To the contrary, in *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), this Court recently reconfirmed that an attorney's solicitation of litigation for his own personal financial gain is not protected under the First Amendment.

Ohralik involved a classic case of "ambulance chasing." A member of the State Bar of Ohio visited a victim of an automobile accident to encourage the victim to retain his services. The underlying purpose of the visit, as found by the lower court, was the prospect of obtaining attorney's fees in connection with the solicited litigation.

This Court upheld the State Bar of Ohio's discipline of the attorney and held that the attorney's solicitation

activities were not protected under the First Amendment. Two specific holdings in *Ohralik* are particularly germane to the present case. First, whenever solicitation by an attorney is based upon the prospect of financial gain to the attorney, a presumption arises that the attorney's judgment will be clouded by greed while engaged in such solicitation. 436 U.S. at 461 n.19. Secondly, the circumstances under which the solicitation occurred in *Ohralik*—specifically, a personal visit by the attorney to the person solicited—further enhances the possibility of abuse arising out of the solicitation. Thus, while the possibility of attorney misconduct is always present,

> the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured or distressed lay person.

436 U.S. at 465.

In several other cases, this Court has found pre-suit solicitation by attorneys for a non-profit public interest organization to be within the protective scope of the First Amendment where there was no prospect that the attorneys engaged in the solicitation stood to gain financially from their activities.

NAACP v. Button, 371 U.S. 415 (1963), involved solicitation activities of NAACP Legal Defense Fund attorneys in 1957 in connection with litigation to desegregate the Virginia public schools. The solicited litigation was brought under a civil rights statute which did not expressly authorize an award of attorney's fees to the prevailing party.[1] *Button* thus did not involve the prospect of personal fi-

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1. Such express statutory authorization of attorney's fees to the prevailing party in a civil rights case did not exist until Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended.

nancial gain to the soliciting attorneys. This Court, therefore, allowed the NAACP attorneys to solicit prospective litigants, inasmuch as "no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor." *Id.* at 443. While this Court held that the solicitation in *Button* was protected under the First Amendment, it also held that where solicitation is based upon the prospect of financial gain to the solicitor, such activity would not fall within the protective scope of the First Amendment.

In re Primus, 436 U.S. 412 (1978), also involved solicitation by an attorney associated with a non-profit public interest organization. In *Primus,* the ACLU made funds available in 1973 for litigation challenging the government's policy of requiring sterilization as a condition of receiving public medical assistance. As in *Button,* the solicitated litigation in *Primus* was brought under a civil rights statute which did not expressly authorize an award of attorney's fees to the prevailing party.[2] An attorney associated with the ACLU was disciplined by the state bar association for notifying a prospective litigant by mail that monetary assistance was available. The discipline was upheld by the South Carolina Supreme Court.

This Court reversed, holding the discipline improper. Noting that the ACLU attorney involved in the solicitation was not involved in the subsequent ACLU-sponsored litigation, this Court based it decision on the fact that there was no prospect or possibility that the soliciting attorney would gain financially from the solicitation. *Id.* at 442, 429-30 n.21, 430 n.24, 436 n.30. This Court also noted that the solicitation was conducted by letter, rather than in person, thereby further reducing the possibility of mis-

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2. See footnote 1, *supra.*

representation arising out of the solicitation. *Id.* at 435. While this Court held that the solicitation involved in *Primus* was thus entitled to some constitutional protection, it also held that the First Amendment did not prohibit the establishment of reasonable restrictions regarding the time, place, and manner of solicitation such as that involved in *Primus*. *Id.* at 438.

The only exception to the general rule that solicitation involving the prospect or possibility of financial gain to the solicitor may constitutionally be proscribed or prohibited is *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *Bates* involved an advertisement of attorney's fees for routine legal services such as uncontested divorces, uncontested personal bankruptcies, and name changes. While the solicitation clearly involved the prospect of financial gain to the attorneys engaged in the solicitation, this Court based its holding that such solicitation was entitled to some constitutional protection upon the nature of the services solicited (routine legal matters) and the context in which the solicitation was presented (a published advertisement). While this Court found that such solicitation was not likely to lead to misrepresentation, overreaching, or undue influence, it nonetheless held that the First Amendment did not prohibit the establishment of reasonable rules relating to the time, place, and manner of such solicitation. *Id.* at 383-384.

The *Bates* decision does not apply to the facts in the case at bar because of the fundamental difference between general advertising and special solicitation, as delineated by this Court in its *Ohralik* decision:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The

> aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Ear, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsel is good ones" is of little value when the circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the availability, nature, and prices of legal services; it actually may disserve the individual and societal interest, identified in Bates, in facilitating informed and reliable decision-making.

436 U.S. at 457-58 (citations and footnotes omitted).

In short, this Court will not allow repression of professional advertisement presented in a general fashion. It is when the lawyer baits his hook with special knowledge of facts and with personal contact, personally encouraging a party to join in litigation which will financially benefit the attorney, that the First Amendment guarantee disappears. Furthermore, the *Bates* decision was limited to advertisement of routine legal services. The practice involved in a complex class action suit is far from "routine."

In *Primus, supra,* this Court noted that the line between constitutionally unprotected *Ohralik*-type solicitation and constitutionally protected *Button* and *Primus*-type solicitation, "based in part on the motive of the speaker [private pecuniary gain or public interest] and the character of the expressive activity [in person or otherwise likely to result in misrepresentation, overreaching, or undue influence] will not always be easy to draw." 436 U.S. at 438 n.32. Clearly, the stated motive of the solicitor cannot be the determining factor, inasmuch as any

attorney worth his salt can show that there are some non-pecuniary, public interests underlying his solicitation activities.

A better test is to look to the statute under which the solicited litigation is brought. In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court ruled that attorney's fees are not recoverable in public interest litigation, absent express statutory authorization for such an award. As a result of *Alyeska*, a federal court can now look to the statute under which the solicited litigation is brought as one indicator of whether solicitation is based upon the prospect of financial gain to the solicitor (through an award of statutorily-authorized attorney's fees) or is instead based upon public interest with no prospect of financial gain (because the statute does not expressly authorize an award of attorney's fees).

Congress has expressly authorized an award of attorney's fees to the prevailing party in a Title VII action, 42 U.S.C. § 2000e-5(g), and has also recently authorized an award of attorney's fees to the prevailing party in other civil rights litigation.[3] Attorney's fees may be awarded under Title VII even if a party prevails on only some of his claims, *Bolton v. Murray Envelope Corp.*, 553 F.2d 881, 884 (5th Cir. 1977), and the amount of back pay and attorney's fees which may be awarded in class litigation under Title VII can be substantial. *See, e.g., Harkless v. Sweeny Independent School District*, 608 F.2d 594 (5th Cir. 1979) ($294,562.00 in attorney's fees). Moreover, neither Congress nor the courts distinguish between attorneys employed by or associated with public interest law firms and private attorneys with regard to entitlement to or computation of attorney's fees for the prevailing party under Title VII. *New York Gaslight Club, Inc. v. Carey*,

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3. **See footnote 1, *supra*.**

..... U.S. ....., 64 L.Ed.2d 723, 738 n.9, ... S. Ct. ..... (1980); *Copeland v. Marshall*, ... F.2d ....., 23 FEP Cases 967, 980-981 (D.C. Cir. 1980). Attorneys representing the prevailing party in a Title VII case are entitled to receive fees based upon the fair market value of their services, whether they work for a public interest law firm or themselves. *Id.* Title VII law regarding the availability and recovery of attorney's fees by an attorney employed by or associated with a public interest law firm is thus very different from the prospect of financial gain to public interest lawyers at the time this Court decided *NAACP v. Button, supra* (when the per diem payment to an NAACP lawyer was "smaller than the compensation ordinarily received for equivalent private professional work," 371 U.S. at 420-421).

The Fifth Circuit discounted the prospect of financial gain to Plaintiffs' attorneys in the case at bar because of affidavits submitted by several of Plaintiffs' attorneys attesting to the fact that they neither received nor expected to receive any compensation for their services "from class members."[4] However, this ignores the fact that in most Title VII class actions where fees have been awarded to

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4. Unfortunately, the record does not show why one of Plaintiffs' attorneys, Stella Morrison, nevertheless obtained retainer agreements from thirty-four of the purported class members. The record is also unclear as to what portion of the potential attorney's fee award would go in which Plaintiff's attorney's pockets. Mr. Goldstein's affidavit states that any court-awarded attorney's fees would not be paid directly to himself or to any other attorney "*at* the Legal Defense Fund" [emphasis added] (presumably referring to Mr. Goldstein, Mr. Greenberg, and Mr. Patterson—the only Plaintiffs' attorneys employed by and at the Legal Defense Fund). Mr. Goldstein does not state whether any court-awarded attorney's fees would be paid to him and the other Legal Defense Fund attorneys indirectly through raises in salary or bonuses. While the record is even more unclear as to what portion of any potential attorney's fee award Bernard's three local attorneys, Thibodeaux, Cotton, and Morrison, who attended the May 22, 1976 meeting, intend to receive, it is reasonable to assume that they expect or hope to receive some compensation for their efforts in this action, should the Plaintiffs and the class prevail.

attorneys associated with or employed by a public interest law firm, the attorneys have recovered said fees directly from the defendant employer, rather than indirectly from the prevailing class members. For example, in *Harkless v. Sweeny Independent School District, supra,* the defendant was ordered to pay $256,000 in attorney's fees directly to the attorneys associated with the Legal Defense Fund.

The Fifth Circuit also ignored the fact that the amount of attorney's fees available to the Plaintiffs and their attorneys, should they prevail in their Title VII action, would be affected by the number of class members for whom relief is obtained as well as the amount of back pay and other relief obtained for said class members. In one of the landmark decisions regarding the computation of attorney's fees under Title VII, *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), the Fifth Circuit held that one of the factors which must be considered by a district court in awarding attorney's fees to prevailing class action plaintiffs and their attorneys in a Title VII case is the size of the class and the amount of back pay and other relief awarded to the class. "If the decision corrects across-the-board discrimination affecting a *large* class of an employer's employees, the attorney's fee award should reflect the relief granted." *Id.* at 718 (emphasis added).

In other words, the bigger the class, the bigger the potential class back pay award and the bigger the potential attorney's fee award. Solicitaton of additional class members to join or otherwise participate in a purported class action also enhances the prospect of class certification under Fed. R. Civ. P. 23(c) and thus the potential recovery of back pay and attorney's fees for the class.[5] Plaintiffs' at-

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5. While it may be argued that solicitation of class members is more likely to occur at the pre-certification stage of the litigation, the conditional nature of a Rule 23(c) certification preserves the possibility of such solicitation throughout the proceeding.

torneys in the instant case thus stand to gain financially by soliciting and otherwise communicating with as many purported class members as possible. This may explain why Plaintiffs' attorney, Stella Morrison, obtained retainer agreements from thirty-four purported class members who attended the May 22, 1976 meeting.

The prospect of substantial financial gain to plaintiffs' attorneys as a result of soliciting and encouraging as many class members as possible to join or otherwise participate in the instant litigation necessarily creates the possibility that such solicitation may involve misrepresentation or overreaching, whether intentionally or not. While the record does not show what, if any, misrepresentations occurred when Plaintiffs' attorneys Thibodeaux, Cotton and Morrison personally met with a number of class members and when Plaintiffs' attorney Morrison obtained retainer agreements from thirty-four of the purported class members at the meeting, Title VII class members are particularly susceptible to possible overreaching or misrepresentation. Few laymen understand the complexities of class litigation. Moreover, courts have repeatedly recognized that class members in Title VII litigation often tend to be unlettered, unsophisticated, and unschooled in the technicalities of the law. *See, e.g., Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970). Personal conversation and personal meetings (such as the one attended by Plaintiffs' attorneys Thibodeaux, Cotton and Morrison on May 22, 1976) can thus eclipse other means of communicating with such persons, making them unusually vulnerable to misrepresentation, overreaching, and undue influence by whoever speaks to them in person. *Ohralik, supra*, at 464, 468.

The fact that Plaintiffs' attorneys have associated lawyers from the Legal Defense Fund to assist in the rep-

resentation of Plaintiffs and the purported class in this matter does not eliminate the possibility of misrepresentation and overreaching in communications with the purported class. While the Legal Defense Fund has a long and illustrious record in the courts of this country, and however laudatory, unselfish, and public-interest oriented the motives of Plaintiffs' attorneys may be in this case, the fact remains that they do stand to gain financially, either directly or indirectly, by expanding the size of the class for which relief is sought.[6] Indeed, if association with the Legal Defense Fund or some other public interest law firm is all that is required to bring communications with purported class members within the protective scope of the First Amendment, when the communications would otherwise be constitutionally unprotected, there would never be another purported class action filed under Title VII which did not have the Legal Defense Fund or some other public interest law firm associated as attorneys for the plaintiffs and the purported class.

In this regard, the Fifth Circuit's suggested analogy between the right of a pre-existing association or organization to engage in collective action to obtain legal redress of constitutionally-protected rights and the right of attorneys in a Title VII action to communicate without re-

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6. In a Brief of the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae filed with this Court in *New York Gaslight Club, Inc. v. Carey*, ... U.S. ....., 64 L.Ed.2d 723, ... S. Ct. ..... (1980) (U. S. Supreme Court Docket No. 79-192), attorneys for the Legal Defense Fund described their interest in attorney's fee awards under Title VII as follows: "a growing and substantial portion of the income of public interest law organizations, including that of *amicus*, comes from counsel fee awards. If fees were not available, the litigation programs of such groups would have to be sharply curtailed." *Amicus Brief*, p. 15 n.9. Assuming that attorneys for the Legal Defense Fund are paid on a salaried basis, what difference is there between Fund attorneys and associates of a private law firm, the funding of whose salary may also depend upon their ability to obtain counsel fee awards?

striction with a group of persons formed and identified by the plaintiffs solely for the purposes of the lawsuit is totally unfounded. The right of association guaranteed under the First Amendment has never been extended to every named plaintiff and purported class member in every action brought as a Rule 23 class action under Title VII or any other statute. Indeed, it would be absurd to believe that the availability of any of the rights guaranteed under the Constitution depends upon the style of a pleading in a civil action. Moreover, while the right to associate guaranteed under the First Amendment includes by implication the right not to associate, courts have generally held that it is impermissible for a Title VII class member to "opt out" of a Rule 23(b)(2) class action. *Gonzales v. Cassidy,* 474 F.2d 67 (5th Cir. 1973). The need for court supervision of class communications in a purported Rule 23(b)(2) class action is thus particularly acute, since once a class member is in, he can't get out.

Furthermore, prior to Rule 23(c) certification of a purported class action, there may be no evidence in the record to show whether the interests of the named plaintiffs are antagonistic or in conflict with the interests of certain members of the purported class. As this Court noted in *General Telephone Co. v. EEOC,* ..... U.S. ....., 64 L.Ed.2d 319, ... S. Ct. ..... (1980):

> conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority.

64 L.Ed.2d at 330. A district court's constitutional right to control communications between the named Plaintiffs, their attorneys and purported class members with potentially adverse interests is, therefore, no different than a

district court's constitutional right to enforce a skip-counsel rule.

This does not mean that no constitutional rights are involved in a purported class action brought under Title VII. Clearly, Plaintiffs and their attorneys in this and every other purported class action brought under Title VII have the constitutional right to procedural due process guaranteed under the Fifth Amendment.

While the district court's order in the case at bar prohibits the Plaintiffs, as well as their attorneys, from soliciting or otherwise communicating with purported class members without the prior approval of the district court, such a prohibition is necessary and constitutionally justified by the above-cited case authority to prevent the Plaintiffs' attorneys from doing indirectly, through the Plaintiffs, that which they cannot do directly.

In *Ohralik, supra,* this Court expressly held that "prophylactic" rules governing solicitation, where pecuniary gain under circumstances likely to result in misrepresentation or overreaching is involved, are constitutionally permissible. 436 U.S. at 464, 468. The prospect of pecuniary gain to Plaintiffs' attorneys and the related possibility of misrepresentation or overreaching during any such communication necessarily taint all such communications and justify the type of "prophylactic" order entered by the district court in the case at bar.

While there is, therefore, no need for a district court to take evidence or issue specific findings of facts to support the issuance of an order regarding class communications in any particular Title VII class action, this does not prohibit a district court from taking evidence in a given case, either to further support the entry of an order regard-

ing class communications or to justify the modification of an order previously entered in the action. However, the taking of such evidence is not constitutionally required, and may not be consistent with the expeditious handling of court business or, in the Title VII area, the Congressional mandate that Title VII litigation be processed and resolved by the district court as expeditiously as possible.[7]

In this regard, cases may arise where a district court decides to allow the parties or their attorneys to communicate with actual or purported class members for the purpose of soliciting legal representation (where, for example, the court determines that the named plaintiff is not an adequate representative of the class) or soliciting funds or expenses, or agreements to pay funds or expenses, necessary to the continued maintenance of the action. For example, the named plaintiff might submit evidence that he is financially unable to continue funding the litigation and that without such solicitation the litigation will die. However, for the reasons set forth above, such solicitation is neither constitutionally protected nor constitutionally required.

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7. Section 706(f)(5) of Title VII, 42 U.S.C. § 2000e-5(f)(5), provides: "It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and *to cause the case to be in every way expedited.* If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to Rule 53 of the Federal Rules of Civil Procedure." (Emphasis added.)

CONCLUSION

For all of the reasons set forth above, the class communications proscribed by the district court's order are not constitutionally protected. Part V of the Fifth Circuit's *en banc* decision should, therefore, be vacated, and the district court's order regarding class communications should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three (3) copies of the foregoing BRIEF OF TALLAHASSEE MEMORIAL HOSPITAL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS have been served this 21st day of January, 1981, by United States Mail, postage prepaid, upon the following counsel of record:

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